Supreme Court, U.S.
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No. 99-2023

In The

Supreme Court of the United States

LORRIE ANN HORNER, by and through her Father nfr Haskel Horner, et al.,

Petitioners,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. STOPHER
Counsel of Record
ROBERT D. BOBROW
BOEHL STOPHER & GRAVES
400 West Market Street
Suite 2300
Louisville, KY 40202-3354
(502) 589-5980

Attorneys for Respondent State Board For Elementary and Secondary Education

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

This respondent, the Kentucky State Board for Elementary and Secondary Education,[1] objects to the petitioners' Question 1 in its entirety. As explained below, the Sixth Circuit Court of Appeals did not decide the issue presented in Question 1. Thus, the issue cannot be put to this Court.

As to petitioners' Question 2, we would reword it as follows: Did the Court of Appeals err when it held that the respondents failed to produce sufficient evidence to avoid summary judgment on their Title IX claims?

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[1] Effective July 15, 1996, statutory references to the "State Board for Elementary and Secondary Education" were changed to the "Kentucky Board of Education". 1996 Acts, Chapter 362, Section 6.

COUNTERSTATEMENT OF THE CASE

This is a Title IX case. The petitioners are former student athletes who claim that the respondents, the Kentucky High School Athletic Association (KHSAA) and the Kentucky State Board for Elementary and Secondary Education (State Board), discriminated against them and violated Title IX by not sanctioning girls' fast-pitch softball before 1992. The petitioners brought this action to force the respondents to sanction girls' fast-pitch softball and for money damages. At this point, the petitioners concede that their claims for injunctive relief are moot.[2] But they argue that they are entitled to compensatory damages under Title IX.

The district court has twice granted the KHSAA and the State Board summary judgment on the petitioners' Title IX claims.[3] On petitioners' first appeal, the Sixth Circuit reversed. The court of appeals held that there were fact issues that precluded summary judgment on petitioners' Title IX claims.[4] The court remanded for further development of the record.[5]

On remand, other than proof of a statistical disparity between boys' and girls' sports participation in Kentucky high schools, the petitioners adduced no additional evidence.[6] Consequently, the district court once again

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[2] Petition for Writ of Certiorari, p. 2 n. 2.

[3] Both district-court opinions are appended to petitioners' Petition. The first is Appendix D. The second is Appendix B.

[4] *Horner v. Kentucky High School Athletic Association*, 43 F.3d 295 (6th Cir. 1995) (attached as Appendix C to petitioners' Petition, p. 80a).

[5] *See Horner v. Kentucky High School Athletic Association*, 203 F.3d 685 (6th Cir. 2000) (attached as Appendix A to petitioners' Petition, p. 27a).

[6] *Id.* (attached as Appendix A to petitioners' Petition, p. 27a).

granted summary judgment in favor of the two respondents. Petitioners appealed a second time.

On the case's second trip to the court of appeals, the Sixth Circuit affirmed the district court's summary judgment. The court held that the petitioners had failed to adduce evidence to establish a *prima facie* case under Title IX.[7]

The court of appeals also discussed the intent the petitioners would have to show to recover compensatory damages under Title IX.[8] The petitioners had argued that a court can award compensatory damages under Title IX on proof of deliberate-indifference/negligence. The court of appeals disagreed. The court of appeals concluded that a Title IX plaintiff would have to show that a defendant intentionally discriminated against her to recover money damages under the statute.[9] The court wrote, "although the Supreme Court has not yet expressly ruled on the point, we think that it would likely hold that proof of intentional discrimination is a prerequisite for money damages under Title IX when a facially neutral policy is challenged under a disparate impact theory."[10]

As shown below, this disagreement over Title IX's intent requirement is purely academic. The Sixth Circuit held that the petitioners failed to establish a *prima facie* Title IX case. As such, the court had no reason to opine as to the intent the petitioners would have had to prove to recover compensatory damages under the statute.

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[7] *Id.* (attached as Appendix A to petitioners' Petition, p. 27a).

[8] *Id.* (attached as Appendix A to petitioners' Petition, pp. 7a-18a).

[9] *Id.* (attached as Appendix A to petitioners' Petition, p. 16a).

[10] *Id.* (attached as Appendix A to petitioners' Petition, p. 16a).

REASONS FOR DENYING THE WRIT

The petitioners present two issues. First, they claim that the Sixth Circuit applied the wrong intent standard to judge their compensatory-damages claims under Title IX.[11] They say the court of appeals erroneously measured their money-damages claims under an intentional-discrimination standard, rather than the "appropriate" deliberate-indifference standard.[12] They urge the Court to adopt the deliberate-indifference standard and remand the case for further proceedings.[13]

Second, the petitioners argue that the court of appeals erred in holding that they failed to produce sufficient evidence "to overcome summary judgment."[14]

I.

UNDER QUESTION 1, THE PETITIONERS DO NOT ATTACK A HOLDING OF THE SIXTH CIRCUIT. THEY ATTACK THE COURT'S DICTA REGARDING WHAT LEVEL OF INTENT A PLAINTIFF MUST SHOW TO RECOVER MONEY DAMAGES UNDER TITLE IX. THIS DICTA IS NOT REVIEWABLE AND PETITIONERS' PETITION SHOULD BE DENIED.

The petitioners contend that Question 1 presents an important issue of law. It does not. Question 1 does not even attack a holding by the court of appeals; it attacks the court's dicta regarding intent. The petitioners' argument under Question 1 ignores the fact that the court of appeals rejected their money-damages claim under Title IX claim because they failed to establish a "predicate

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[11] Petition for Writ of Certiorari, pp. i, 4-6, 9-13.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 14.

violation,"[15] not because they failed to meet the court's proposed intent requirement for recovering money damages.[16]

The Sixth Circuit had no reason to reach the topic of intent. The court's **holding** was that the petitioners failed to establish a *prima facie* Title IX claim.[17] With this holding, the court did not need to decide the intentional-discrimination point. The holding mooted the damages issue. The court's discussion of the intent requirement for money damages is dicta. Put directly, even if this Court were to "reverse" the Sixth Circuit's dicta regarding the intent requirement (if that were possible), the court of appeals' holding that the petitioners failed to establish a *prima facie* Title IX case would still stand and so would the summary judgment in favor of the respondents.

In sum, the Sixth Circuit need not have addressed intent. By holding that the petitioners failed to establish a *prima facie* case under Title IX, the court of appeals eliminated any need to explore the standard for awarding money damages under the statute.[18] Without a "predicate violation" of Title IX, damages were a non-issue.[19] The court expressly recognized this.[20] Yet it offered its comments on intent nonetheless. This commentary is not

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[15] *See id.* (attached as Appendix A to petitioners' Petition, p. 27a).

[16] *See id.* (attached as Appendix A to petitioners' Petition, pp. 27a-28a).

[17] *Horner*, 203 F.3d at 685 (attached as Appendix A to petitioners' Petition, pp. 19a-29a).

[18] *See id.* (attached as Appendix A to petitioners' Petition, p. 27a).

[19] *See id.* (attached as Appendix A to petitioners' Petition, p. 27a).

[20] *Id.* (attached as Appendix A to petitioners' Petition, pp. 27a-28a).

reviewable. As such, we respectfully submit that the Court should deny the petitioners' Petition as to Question 1.

II.

UNDER QUESTION 2, THE PETITIONERS ATTACK THE SIXTH CIRCUIT'S HOLDING THAT THEY FAILED TO ADDUCE SUFFICIENT EVIDENCE TO ESTABLISH A *PRIMA FACIE* TITLE IX CASE. SUCH A CASE-SPECIFIC ISSUE IS NOT AN ISSUE WORTHY OF REVIEW BY THIS COURT.

Under Question 2, the petitioners argue that the district court and the Sixth Circuit erred by holding that the petitioners failed to adduce sufficient evidence to establish a *prima facie* Title IX case. While we disagree, it is not necessary at this point to explain why. It is enough to point out that Question 2 does not raise an issue that has any implications outside of this case. If the Court decided Question 2, its decision would have little or no precedential value. As such, we respectfully submit that the Court should deny the petitioners' Petition as to Question 2.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the Court should deny petitioners' Petition.

Respectfully submitted,

ROBERT E. STOPHER
Counsel of Record
ROBERT D. BOBROW
BOEHL STOPHER & GRAVES
400 West Market Street
Suite 2300
Louisville, KY 40202-3354
(502) 589-5980

Attorneys for Respondent State Board For Elementary and Secondary Education